UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Norvin E. Powell, III Appellant vs. United States of America Appellee	No. 22556 (Crim.)

Appeal from the United States
District Court for the Central
District of California

Brief for Appellant

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I. INTRODUCTION:

This is an appeal from a judgment of conviction for six separate counts as follows: Counts I and IV (concealing and transporting narcotics); Counts II and V (selling narcotics); and Counts III and VI (transfering narcotics.) Counts I, II, IV and V are based upon 21 U.S.C. 176a, and Counts III and VI are based upon 26 U.S.C. 4742a.

An indictment against appellant Norvin Ethan Powell, III, was filed on May 18, 1966, for the above mentioned counts. Powell was arraigned and pled not guilty to all counts on May 31, 1966. The minutes of the court of June 21, 1966, show that Powell's motion for a continuance of the trial was denied. After a two day trial, Powell was found guilty of all charges by the jury on June 22, 1966. The jury's verdict was filed on the same day.

At the sentence proceedings on July 12, 1966, Powell was sentenced to five years imprisonment for each of the counts, to begin and run concurrently. A judgment and commitment were filed on July 12, 1966. Notice of appeal was filed by appellant Powell on July 15, 1966.

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1. References are to the thin clerk's transcript in this introduction. Because the pages are confusingly numbered, no reference is made to the page numbers in the

II. FACTS:

Paul N. Kayne, the first witness for the prosecution, testified that he was a chemist and identified two packages which were each composed of two bricks of marijuana. (TR 3:3-8:4.) On cross-examination he stated that he had made no determination indicating the source of the plant material which he identified as marijuana. (TR 8:5-21.)

The chain of custody of the two exhibits was stipulated to by counsel. (TR 9:11-10:24.)

William Turnbou, a federal narcotics agent, testified that he knew Powell. (TR 13:2-6.) He went to Powell's house at 1514 1/2 Ewing Street in Los Angeles with Leroy C. Dukes, Sr., who was also known as "Abdula," on April 11, 1966, about 9:30 p.m. (TR 13:8-20.)

Abdula introduced the witness to Powell, stating that the witness wanted some "pot." (TR 14:8-18.) Powell quoted a price of $135 per kilogram. After the witness agreed to buy, Powell left with his bass fiddle. He returned about midnight with the marijuana and exchanged it for $270 the agent had. (TR 15:1-20.)

On April 27, the agent made a similar purchase

from Powell while with Abdula. (TR 17:8-18:6.) The terms and details of the transaction were approximately the same. (TR 18:5-21:2.) On cross-examination the agent testified that he met Abdula in February, 1965. At the time Abdula was charged with smuggling heroin in from Mexico. (TR 21:12-23:7.) The government rested; Powell's motion for acquittal was denied. (TR 48:7-13.)

Abdula testified that he was an unemployed musician and truck driver. (TR 50:1-10.) He was arrested for smuggling five ounces of heroin from Mexico in April, 1965. (TR 50:18-52:13.) He was indicted in May, 1965, and was presently free on bail. (TR 52:18-53:12.)

Abdula met Powell in early 1965 at a club called Mother Neptune's. (TR 56:16-57:1.) Abdula went to Powell's house from time to time and they discussed music and narcotics. (TR 58:11-62:18.) Abdula began working for the narcotic enforcement officers in February, 1966. (TR 73:1-5.) He had been indicted but had not gone to trial during the eleven month period. His trial had been set on several occasions, but was continued from time to time. He agreed to

work for the narcotics bureau as an informer in November, 1965. Because of this, he believed that he would be given "consideration for cooperating," and did "expect something in return." (TR 73:4-76:3.) His testimony was substantially similar to agent Turnbou's.

Powell testified that he had seen Abdula use narcotics; Abdula had also tried to sell him narcotics. (TR 110:17-111:7.) On April 3, Abdula came to Powell's house and offered to return a bass fiddle if Powell would do some work for him. (TR 116:9-117:2.) The next day Abdula asked Powell to "front" for him in some sales of narcotics. (TR 116:6-117:15.) Abdula was to bring the purchasers to Powell's house, and all Powell had to do was act as if the narcotics were his. (TR 128:4-9.) Abdula phoned and pestered him on April 5. (TR 132:1-7.) By trickery Abdula forced Powell to complete a sale of Marijuana on April 6. (TR 132:8-135:5.)

Powell and Abdula later almost came to blows because of this. (TR 135:11-136:9.) Abdula threatened him. (TR 136:21-137:5.) Prior to April 27, Abdula tried to get Powell to handle another transaction.

(TR 140:3-17.) Abdula eventually forced him into it by telling Powell that if he cooperated, Abdula would return Powell's valuable bass fiddle. (TR 140: 20-141:4.) Another sale took place on April 27 (TR 142: 12-147:3), but Powell refused Abdula's later requests. (TR 147:19-23.)

During cross-examination, the court participated by asking a very specific question concerning the phone number of Abdula's contact, Pocci. (TR 172:8-173:17.) The incident is discussed in detail, infra.

Reynoldo Navarro testified that Abdula had sold him some marijuana in January of 1966. (TR 121: 1-22.) On cross-examination he testified that he was presently in custody for the conviction of a marijuana offense. (TR 122:9-16.)

Agent Turnbou testified in rebuttal. (TR 190:1-3.)

Errors committed by the trial judge in instructing the jury are described in detail, infra.

III. QUESTIONS PRESENTED:

A. It was prejudicial error for the trial court to comment on the credibility of appellant's only defense witness.

B. It was prejudicial error for the trial court to cross-examine Powell.

C. It was prejudicial error for the trial court to allow the marijuana to be taken into the jury room.

D. Powell was denied the effective assistance of counsel.

E. A conviction based upon evidence coerced from an informant by granting continuances in his own criminal trial so that he could "finger" other marijuana violators must be set aside.

F. There was no evidence which would allow the jury to find that Powell knew that the marijuana "had been imported and brought into the United States contrary to law."

G. The instruction of the trial court erroneously switches the burden of proof to Powell.

H. Since the requirements of reasonable notice and demand by the Secretary of the Treasury under 26 U.S.C. 4744-A were not proved at trial, it was reversible error to instruct the jury on that point.

IV. ARGUMENT:

A. It was prejudicial error for the trial court to comment on the credibility of appellant's only defense witness.

In commenting on the credibility of Powell's only defense witness, Navarro, the court stated: "Now this is just my opinion, because of the contrast in his testimony, and for other reasons, that testimony is not worthy of belief." (TR 206:14-17.) This directly implied that Powell was guilty, as only a guilty man would put a liar on the witness stand to fabricate favorable evidence.

A jury is sensitive to manifestations, however subtle, of the judge's belief in the defendant's guilt or innocence. (Moore's Federal Practice (1967) Instructions, §30.02, p. 30-3.) It is difficult enough to try to maintain an appearance of judicial impartiality in a criminal case, but when the judge is permitted to verbalize his personal reactions to evidence, the difficulty is compounded. And the difficulty is scarcely alleviated by off-handedly telling the jury, "Now this is just my opinion, . . ." (RT 206:14.)

In Blunt v. United States (CADC 1957) 244 F.2d 355, it was held reversible error where the trial court instructed the jury that the defense psychiatrists'

opinion was just a "feeling" and not based on fact.

No objection was necessary in this instance as FRCrP 52 controls FRCrP 30. (Screws v. United States (1945) 325 U.S. 91, 107; Moore's Federal Practice (1968) Harmless and Plain Error, §52.03[2], p. 5213.)

If it is necessary for a judge to comment upon the credibility of a witness, then there is something seriously wrong with our method of trying facts and we must begin to ask some critical questions about the premises of the adversary system.

B. It was prejudicial error for the trial court to cross-examine Powell.

During Powell's cross-examination concerning his telephone conversation with Abdula's drug supplier, Pocci, Powell testified that he was coerced by Abdula to call the supplier. (TR 173:2-13.) The court sarcastically asked Powell the first two digits of the phone number. (TR 173:14-15.)

Without doubt this was reversible error for the court to participate in Powell's cross-examination. To ask Powell such an irrelevant question was obviously a reflection of the court's lack of belief in Powell's

testimony, and without question the jury was influenced thereby.[2]

The judge must not assume the role of an advocate or of a prosecutor. (United States v. Lee (CA7,Wis. 1939) 107 F.2d 522, 525, cert. den. 309 U.S. 569.) The trial court therefore committed error.

C. It was prejudicial error for the trial court to allow the marijuana to be taken into the jury room.

The trial court allowed the two government exhibits of marijuana to be taken into the jury room. (TR 203: 15-19.) Allowing exhibits such as this to be taken to the jury room in criminal cases is prejudicial and in no way facilitates effective jury deliberation.

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2. An additional example of the judge's influence on the jury occured as follows: On the first day of trial the court let the jury go at 4:00 p.m. to avoid the "freeway traffic." (TR 105:1-14.)

It is interesting to note that the jury returned with a verdict on the second day of trial also exactly at 4:00 p.m. (TR 224:10-11.)

Such circumstances indicate that the jury were supple in complying with the judge's apparent wishes.

(Karn v. United States (CA9, Alaska 1946) 158 F.2d 568, 572, overruled on other grounds; Kaplan v. United States (CA9, Cal. 1964) 329 F.2d 561; People v. Bartone (1958) 172 N.Y.Supp.2d 976; Orfield, Criminal Procedure Under the Federal Rules (1967) §26:683, pp. 257-259.)

The marijuana had been properly identified as such to the jury during trial (TR 3:24-7:23), and there was no need to send it into the jury room. Marijuana has a peculiar odor, and to allow it to be taken to the jury room would cause the jury to pay unnecessary attention to it, thereby interfering with its deliberations.

If this court approves with this procedure, it is only logical to conclude that it would also approve sending bloody knives used in murders, the undergarments of a rape victim, or grisly pictures into the jury room. Although the use of such evidence may be very proper at trial, sending such evidence to the jury room unduly emphasizes one fact of the case, the gravity of the crime committed.

The trial court therefore committed prejudicial error.

D. Powell was denied the effective assistance of counsel.

In a motion for a continuance Powell's counsel stated that on the day previous thereto, Powell informed him that the witnesses that Powell intended to call were in Mexico City. The attorney stated that without their testimony or presence, Powell would be extremely prejudiced. (STR[3] b:9-18.) The motion was denied and Powell went to trial the same day. The only reason given by the court was that the court would not reverse his fellow member of the bench, who had ruled similarly earlier in the day. (STR b:25-c:7.)

The Sixth Amendment requirement of assistance of counsel is one of substance and not of form. It cannot be satisfied by a pro forma or token appearance and a defendant is entitled to effective aid in the preparation and trial of the case. (Powell v. Alabama (1932) 287 U.S. 45, 56-58, 71.) One aspect of effective assistance is adequate time for counsel to prepare for trial. (Comment (1967) 8 Santa Clara Law. 108; and cases cited therein.)

There is no express provision in the Federal

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3. Supplemental Transcript of Record.

Rules of Criminal Procedure for a motion for a continuance, although there is no question of its availability upon a proper showing. Certainly a need for time to produce witnesses in defense would be a proper showing.

Since the motion was denied, Powell was forced to dig into the "bottom of the barrel" for Novarro, who became Powell's Achilles' heel in the court's charge to the jury. (See issue A, supra.)

Under the Sixth Amendment Powell was entitled to have the effective assistance of counsel for his defense and to have compulsory process for obtaining witnesses in his favor. In this case, the former was impossible without the latter. To one accused of crime these are very substantial rights. Yet they are barren if given at a time when assistance by counsel in issuing subpoenas is impracticable and when service of subpoenas and the appearance of witnesses is impossible. (Paoni v. United States (3d Cir. 1922) 281 F. 801, 803; Neufield v. United States (USDC 1941) 118 F.2d 375, 391, concurring opinion.)

While it is probable that the trial court had some reason for denying the motion, none appears in the record. The record discloses with certainty only one

thing, it does not tell the whole story. Because the trial judge did not make an adequate record, he abused his discretion. (Paoni v. United States, supra at p. 804.)

Because of the denial of effective assistance of counsel, the denial of compulsory process of witnesses, and for failure to preserve an adequate record, the judgment should be reversed.

E. A conviction based upon evidence coerced from a/informant/by granting continuances in his own criminal trial so that he could "finger" other marijuana violators must be set aside.

LeRoy "Abdula" Dukes was arrested for smuggling five ounces of heroin across the Mexican border in April, 1965. (TR 49:24-52:13.) This was approximately one year before he "set up" Powell. (TR 203:20-208:19.) Abdula was indicted by the grand jury in May, 1965. (TR 52:18-21.) He had never been brought to trial on these matters. (TR 53:2.) His systematic contacts with Powell on the pretext of giving him bass fiddle pointers and instructions is well-detailed in the record. (TR 55:3-71:22.) Abdula's trial had been set and too conveniently continued during the eleven months prior to nabbing Powell. (TR 73:9-74:5.)

Abdula agreed to be an informer for the

Narcotics bureau. (TR 74:5-21.) He was promised that he would be given "consideration" for cooperating, and Abdula expected something for cooperating. (TR 75:12-22; 76:1-3.)

Such a situation is analagous to that presented in Williamson v. United States (CA5 1962) 311 F.2d 441, 444, where in the absence of justification for a contingent fee arrangement, convictions based upon evidence of informers hired under a contingent fee arrangement to produce evidence against a defendant cannot stand as to crimes not yet committed at the time of the hiring.

In our facts, at no time did the government justify their contingent arrangement with Abdula, i.e. as long as he cooperated, they would not prosecute and would allow him his freedom. In addition, Abdula was hired before the crimeswere committed.

"The crucial question . . . to which the court must direct itself is whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power. For answer it is wholly irrelevant

to ask if the 'intention' to commit the crime originated with the defendant or government officers, or if the criminal conduct was the product of 'the creative activity' of law enforcement officials. (Sherman v. United States (1958) 356 U.S. 369, 382.)

The use by the government of a confirmed narcotic offender as an informer, while there is pending against him serious charges of narcotic violations has been condemned. "Today and tomorrow, following the law, we shall be forced to convict on the basis of evidence obtained by enforcement officials using informers who are helpless victims of habit." (Matysek v. United States (CA9 1963) 321 F.2d 246, 249.)

F. There was no evidence which would allow the jury to find that Powell knew that the marijuana "had been imported and brought into the United States contrary to law."

Counts I, II, IV and V require the jury to find that Powell knew that the marijuana "had been imported and brought into the United States contrary to law." (TR 203:21-205:10.) A search of the record in this case reveals no evidence to support this conclusion. The only evidence presented which was even related to this point, was the statement of the

prosecution's expert that:

"Q Is it possible, Mr. Kayne, to tell whether or not Exhibits 2 -- 1 and 2, which are now before you, were in fact grown in the United States or grown in Mexico?

A To the best of my knowledge, I do not know of a way of definitely distinguishing the source of origin of the plant material." (TR 8:16-20.)

The jury was instructed: "You are to be governed, therefore, soley by the evidence introduced in this trial . . . ." (TR 207:12-14.) Since no evidence was produced by the prosecution to prove that the marijuana "had been imported and brought into the United States contrary to law," the four convictions under these counts must be reversed.

The prosecution committed a strategic error: because it did not have the necessary evidence, it should have turned this evidence over to state authorities for conviction under state law.

G. The instruction of the trial court, erroneously switches the burden of proof to Powell.

The trial judge instructed the jury concerning counts I, II, IV and V of the indictment that, "Whenever on trial for a violation of this section, the defendant is shown to have or to have had the marijuana in his possession, such possession shall be deemed sufficient

explains his possession to the satisfaction of the jury." (TR 212:2-8; 215:6-11.) Even though the judge cautioned the jury that, "This statute does not change the fundamental rule that the accused is presumed innocent, until proven guilty . . . ." (TR 215:12-19), this was so conflicting as to amount to serious error and a misinstruction.

The burden was therefore on Powell to prove that the marijuana was not imported. The burden is on the prosecution to prove every essential element of the crime charged, every fact and circumstance essential to the guilt of the accused, and the prosecution must meet this burden. (22A C.J.S. Criminal Law, §566, pp. 308-310, and voluminous authority cited therein.)

These four convictions should therefore be reversed.

H. Since the requirements of reasonable notice and demand by the Secretary of the Treasury under 26 U.S.C. 4744-A were not proved at trial, it was reversible error to instruct the jury on that point.

The trial court gave the following instruction regarding the charge under 26 U.S.C. 4742a (transferring narcotics, counts III and VI herein): "Proof that any person shall have had in his possession any marijuana and shall have failed after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by Section 4742 to be retained by him shall be presumptive evidence of guilt under this subsection and of liability for the tax imposed by Section 4741(a)." (TR 213:2-10.)

The court erred by instructing the jury as to law pointing to or presuming Powell's guilt when there were absolutely no facts in the record to support the instruction. No demand was ever shown to be made by the Secretary or his delegate.

The court also instructed the jury that an essential element of counts III and VI was the transfer without the written order from the buyer. (TR 216:9-16.) Since no demand was made on Powell by the Secretary of the Treasury, an essential element of Counts III and VI was not proved. (See issue F, supra.)

Hence, the convictions resulting from Counts III and VI should be reversed.

V. CONCLUSION: Because of the numerous errors in the trial of Powell, all counts of the conviction must be reversed.

April, 1969

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